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Malvern TCB 03-03
PFE ORIGINAL/Joan

Joan Armstrong

03/10/2003 11:21 AM

To: Leo Mullin/R3/USEPA/US@EPA
cc: Joan-A Johnson/R3/USEPA/US@EPA, Patrick
Egan/R3/USEPA/US@EPA, Mark Stephens/R3/USEPA/US@EPA
Subject: Re: Malvern Meeting

Leo, Pat, and Joan:

This is exactly the reason why Carlyn and I wanted to go forward in December with a settlement offer to everyone. We basically were told that the contribution action wouldn't impact going forward with the 8 or 9. Now you are saying it is. I think I would have fought harder to include everyone if it was not for some assurances that were made back then.

Hopefully everyone can make the meeting tomorrow to discuss.

Joan Armstrong, Chief
PRP Investigation & Site Information Section
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Leo Mullin



Leo Mullin

03/10/2003 09:58 AM

To: Patrick Egan/R3/USEPA/US@EPA
cc: Joan-A Johnson/R3/USEPA/US@EPA, Joan
Armstrong/R3/USEPA/US@EPA
Subject: Re: Malvern Meeting

Pat,

Tomorrow at 11:00 works for me. I think Heather and DOJ should join the meeting and I think the focus should be on a comprehensive plan instead of a discussion on one limited settlement.

The Owner/Operator settlement has been in negotiations for more than three years. We still have much to do before a signature ready document is prepared.

We have some ability to pay settlements that are in the pipeline with CSS in public comment and Quaker soon to follow. Even if CSS is not challenged, Quaker will be.

You have the 54 de minimis settlement eligible defendants (a number greater than 25-30), 90 named defendants who do not appear on our waste-in list, and the 15 named defendants who we list as having settled.

The responses to the contribution action may be submitted by the end of this month. The initial disclosures will follow. This is likely to produce new and significant information in terms of volume and allocation. Had we sent the offer in December, we could have resolved the liability of the 8-9 before this information became available. Based on the current timing, the responses to the contribution litigation will be submitted before the de minimis public comment period concludes. With the newly available information we may appear arbitrary unless we review and consider these submissions.

If the settlement offer to the 8-9 is radically changed or delayed by the public comment process, then what is the benefit to these 8-9? Maybe it is better that we plan a de minimis offer that is extended to all de minimis.

Just as important is the resource issue. In terms of fairness and dollars, the liability of the Owner/Operator significantly outweighs the 8-9 de minimis defendants. I think we need to make sure that our other actions do not derail the owner/operator settlement. (Otherwise the PRP that played the largest

role in creating the liability continues to avoid payment.)

From a different perspective, the CSDG realize that the number of viable PRPs is much less than anticipated. With a dwindling pool of money, the CSDG has no recourse but to categorize every EPA settlement as too little, so we should expect them to challenge each settlement. Given the likelihood of challenges to settlements and the resource drain from the challenges I would like us to consider the best way to proceed (move each settlement forward on independent tracks, prioritize the settlements and/or coordinate the settlements so that we get one massive filing).

Finally, with the filing of the contribution action, this Site is now under the jurisdiction of two federal judges. I think our deminimis settlement position needs to incorporate the potential reactions of one or both judges.

I understand that we have a mandate to assist deminimis PRPs. I regret that we have not extended an offer to settle with this 8-9 group. Unfortunately I think the window to settle with this group has closed and they must now be rolled into a larger more comprehensive deminimis settlement. I admit that my view may not be accepted by the rest of you, but I ask that we consider this view and that we work to prioritize our actions. If tomorrow can't work for everyone maybe a few of us can meet to discuss some of the aspects.

Leo